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12 SUPERIOR COURT OF STATE OF ARIZONA
13 COUNTY OF YAVAPAI

14 **STATE OF ARIZONA,**

15 Plaintiff,

16 vs.

17 **JAMES ARTHUR RAY,**

18 Defendant.
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CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
REPLY IN SUPPORT OF MOTION IN
LIMINE NO. 8 TO EXCLUDE
TESTIMONY OF STEVEN PACE**

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JEANNE L. RIOS, CLERK

BY: Ivy Rios

1 **I. INTRODUCTION**

2 The State has now articulated the central theory of its case: the State intends to prove that
3 Mr. Ray employed psychological techniques to compel participants to choose to stay in the sweat
4 lodge and that this caused three deaths. *See* State's Response to MIL No. 9 re: Rick Ross, at 1, 7,
5 8. Setting aside whether such a theory has any legal or factual foundation, it plainly renders
6 inadmissible the testimony of Steven Pace in this criminal homicide trial. The State's Response,
7 asserting that Mr. Pace will testify as to the "standard of care a reasonable person in Defendant's
8 circumstances . . . should have complied with," Response at 2, simply does not address the
9 independent bars to admissibility raised in Mr. Ray's opening motion.

10 For three distinct reasons, Pace's testimony is irrelevant and therefore inadmissible. First,
11 and critically, the standard of care Mr. Pace discusses pertains to conduct *entirely different from*
12 the alleged criminal conduct in this case. As just noted, the criminal conduct the State has alleged
13 in this case is Mr. Ray's supposed "attemp[t] to keep the victims from leaving the sweat lodge."
14 *See* State's Response re: Rick Ross, at 1, 7, 8. Yet the practices Pace discusses apply only to
15 general business practices of adventure-based learning programs, none of which relates in any
16 way to the conduct alleged by the State—purportedly keeping participants from leaving the sweat
17 lodge. The *only* standard of care that can *ever* be relevant in a criminal recklessness trial is the
18 one that attaches to the causal conduct. The standard-of-care inquiry, in other words, is: (1) did
19 the defendant's action cause the deaths, and (2) was *that action* a gross deviation from the
20 standard of care? The assessment the State seeks to launch into the laudability of JRI's corporate
21 practices would serve only to cloud the issues by improperly introducing concepts of civil
22 negligence and corporate liability.

23 *Second*, Mr. Pace's testimony pertains only to the standard of care applicable to JRI as a
24 corporate entity, not to Mr. Ray as an individual. Mr. Pace is an educator and consultant on the
25 risk management practices of *organizations* like NOLS and Outward Bound. *All* of the standards
26 described in Mr. Pace's expert report pertain to the standards to be followed by an organization.
27 *None* speaks to the standard of care for an individual educator or program leader. This difference
28 is critical, for an individual cannot be held criminally liable for the acts of a corporation, or held

1 to the corporation's standard of care. Furthermore, even as to organizations, it is not clear that Mr.
2 Pace's opinions delineate the standard of care. By his own description, his recommendations set a
3 gold-standard currently followed by only a select group of adventure organizations.

4 *Third*, Mr. Pace's testimony pertains exclusively to a legal theory that cannot be the basis
5 for criminal liability. If permitted to testify, Mr. Pace would describe risk management practices
6 that JRI did not implement, but which the State will insinuate should have been implemented—
7 and therefore Mr. Ray was reckless. *See* State's Response re: Steven Pace at 2. Arizona law and
8 the Due Process Clause, however, proscribe criminal liability based on *omissions* absent an
9 independent legal duty of which the defendant had notice. *See State v. Angelo*, 166 Ariz. 24, 28
10 (App. 1990). Not only has the State failed to identify any such legal duty here, but any legal duty
11 found in Mr. Pace's testimony would be that of JRI as a company, not Mr. Ray as an individual.

12 Finally, even if Mr. Pace's testimony had any relevance to a permissible legal theory, Rule
13 403 would warrant its exclusion here. At most, the risk management standards Pace identifies
14 bear on the extent to which JRI was a commendable corporation. But this is a *criminal homicide*
15 trial against an individual defendant, not a civil negligence suit against a company. Mr. Pace's
16 testimony would invite the jury to decide Mr. Ray's guilt or innocence based on completely
17 inapposite assessments of whether JRI, as a corporation, might have been civilly negligent in its
18 risk management. The jury questionnaires reflect that prospective jurors are already confused on
19 precisely that distinction. *See, e.g.*, Questionnaire of Juror 295636 ("I read press reports
20 extensively in this case and have a distinct pre-opinion of the negligence of the organizers."). Mr.
21 Pace's testimony must not be permitted.

22 **II. ARGUMENT**

23 **A. Mr. Pace's testimony is not relevant to the criminal charges against Mr. Ray.**

24 **1. The standard of care Mr. Pace identifies is not applicable to the** 25 **alleged criminal conduct.**

26 The *only* standard of care that is relevant and admissible in a criminal
27 manslaughter case is the one that corresponds to the defendant's alleged criminal conduct. This
28 basic rule renders Mr. Pace's testimony irrelevant and inadmissible. To the extent the practices

1 that Mr. Pace champions do delineate a standard of care, that standard is *completely divorced*
2 from the State's theory of the case and the alleged criminal conduct with which Mr. Ray is
3 charged. As noted above, the State's theory is that Mr. Ray caused the three deaths at issue by
4 using various "persuasive techniques" to prevent participants from leaving the sweat lodge. *See*
5 Response to MIL No. 9 re: Rick Ross, at 1, 7, 8. Accordingly, the only valid standard-of-care
6 inquiry asks whether *those* alleged acts constituted a gross deviation from the standard of care
7 attendant to *those* circumstances. Whether JRI implemented the risk management practices Mr.
8 Pace describes has no bearing at all on whether Mr. Ray committed a crime under Arizona law.

9 For example, the State will likely elicit testimony from Mr. Pace that JRI should have
10 required participants to fill out medical screening forms in addition to waivers before
11 participating in the sweat lodge. Setting aside for a moment that the duty to require such a form
12 would run *only* to JRI, and not to Mr. Ray, the defect in this testimony is that the presence or
13 absence of medical forms is *in no way* related to the cause of deaths in this case or to Mr. Ray's
14 alleged criminal act. The presence or absence of the protocols that Mr. Pace recommends—not
15 just medical screening, but also various kinds of manuals, operating plans, and equipment
16 inspection—are simply orthogonal to the question of Mr. Ray's guilt or innocence.

17 *State v. Far West Water and Sewer*, 228 P.3d 909 (Ariz. App. 2010), on which the State
18 relies, does not support the admissibility of Mr. Pace's testimony. Rather, it illustrates the limited
19 role of standard-of-care testimony in a criminal case. In *Far West*, a sewage treatment corporation
20 knowingly violated OSHA regulations and adopted blatantly unsafe policies to save time and
21 money. Because of these policies, employees at the sewage treatment plant entered a toxic tank,
22 passed out from inhaling gases, and drowned in the sewage. The deaths "directly resulted" from
23 the corporation's circumvention of OSHA and subjection of its workers to wildly unsafe
24 practices. *See id.* at 930. The court admitted testimony from OSHA experts to establish the
25 corporate standard of care for this causal conduct. The experts explained that the type of facility
26 that Far West operated was required by law to obtain a permit and implement specific safety
27 protocols (all of which were ignored). Ultimately, the jury and court concluded the corporation's
28 knowing, flagrant, and egregious conduct in circumventing the OSHA requirements constituted a

1 gross deviation from the standard of care. *Id.* at 929. The *only* relevant standard of care, it bears
2 emphasis, pertained to the specific conduct that caused the deaths. By way of illustration, under
3 the State's unbounded reasoning here, the *Far West* court could also have admitted testimony to
4 establish the standard of care for Far West's accounting practices, human resources practices, or
5 any other practice unrelated to the causal conduct. That is not the law.

6 **2. The standard of care Mr. Pace identifies applies only to corporations,**
7 **not to individual instructors within corporations.**

8 The Defense agrees with the State that evaluating a recklessness charge requires
9 determining what a reasonable individual would do under the particular circumstances
10 surrounding the defendant. *See* State's Response at 2. The problem with the State's argument,
11 and the second reason that Mr. Pace's testimony is irrelevant, is that his testimony pertains only
12 to the standard of care for an *organization*.

13 The State attempts to sidestep this flaw by stating simply that "Mr. Pace will testify about
14 the standard of care for a person running an adventure program, precisely the situation that will be
15 presented to the jury in this case." Response at 3. This conclusory statement does not and cannot
16 deny the fact that *all* of Mr. Pace's opinions disclosed to the Defense, and indeed the entire nature
17 of his expertise, pertains to evaluating "the overall safety of an organization." Expert Witness
18 Report of Steven Pace, Considerations Used to Assess Program Safety, at 1. Mr. Pace would
19 testify regarding "how to look at an organization, what you would look at to decide whether it
20 was adequately run." Transcript of Steven Pace Interview, 1/19/2011, at 3:27-4:1. Every aspect
21 of his expert witness report involves criteria for how an *organization* should address screening
22 procedures, staff hiring, training and development, management systems, safety programs, and
23 emergency procedures. There is no discussion about what an individual instructor should do.

24 This disconnect renders inadmissible Mr. Pace's testimony. JRI, of course, is not on trial
25 here. JRI employed over twenty people in numerous positions—none of whom face, or should
26 face, criminal prosecution. And the law is clear that an individual cannot be criminally liable for
27 the conduct of a corporation. *See, e.g., Angelo*, 166 Ariz. at 28 (corporate officers could not be
28 criminally liable for corporation's failure to file tax returns). Mr. Pace's testimony on corporate

1 risk management practices therefore does not pertain to any permissible legal theory or fact in
2 issue in this homicide trial.

3 **3. Mr. Pace's standards pertain only to Mr. Ray's alleged omissions,**
4 **which cannot be the basis for criminal liability.**

5 Mr. Pace's testimony is irrelevant and inadmissible for a third reason: it bears only on the
6 State's arguments that Mr. Ray *failed to take* certain actions. Under Arizona law, however, and
7 consistent with the notice requirements of the Due Process Clause, omissions cannot be the basis
8 for criminal liability unless the defendant had an independent legal duty to act. *See* A.R.S. §13-
9 201 (the "minimum requirement for criminal liability is the performance by a person of conduct
10 which includes a voluntary act or the omission to perform *a duty imposed by law*"); *Angelo*, 166
11 Ariz. at 27 (corporate officers could not be criminally liable for failure to file a tax return because
12 the officers did "not have a personal statutory duty to file" under the statute). "[T]he duty must be
13 found outside the definition of the crime itself, perhaps in another statute, or in the common law
14 or in a contract." *State v. Brown*, 129 Ariz. 347 (App. 1981). In *Far West*, the corporation had a
15 statutory and common-law duty to provide a safe workplace for its employees. *See* 228 P.3d at
16 922, 932. In this case, in contrast, the State has *never* identified *any* independent legal duty,
17 much less a duty that could run to Mr. Ray as an individual rather than to JRI.

18 **B. Rule 403 calls for exclusion of Mr. Pace's testimony.**


19 Finally, even if Mr. Pace's testimony were relevant, Rule 403 would warrant its exclusion.
20 Testimony regarding best practices for organizations would encourage jurors to base Mr. Ray's
21 guilt or innocence on conduct that is not and cannot be the basis of the criminal charges against
22 him. The State posits that "there is no danger of confusion of the issues," Response at 3, but the
23 State's Response does just that: by saying that Mr. Pace's testimony on "how to safely run an
24 adventure program" applies to Mr. Ray as an individual, the State ignores entirely the corporate
25 form and all the legal rules that accompany it. If Mr. Ray is to have the fair trial that the
26 Constitution guarantees, the State's presentation must focus on whether he recklessly caused the
27 three deaths—not whether JRI should have implemented Mr. Pace's state-of-the-art corporate risk
28 management procedures.

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Copy of the foregoing delivered this 14th day
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by 